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## CRIME AND PUNISHMENT.

THE INFLUENCE OF THE STUDY OF THE RESULTS OF PRISON PUNISHMENTS ON THE CRIMINAL LAW.

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The statement of my theme involves two fundamental assumptions, both calling for examination: the first, that the system of penal imprisonment involves results requiring and capable of investigation; the second, that the study of those results may be expected to bear fruit in the modification or amendment of the law by which that system is created and supported. And, as our criminal law is the expression either of the public will or of the will of certain ascertainable elements in the community, there is a further implication that that will is modifiable and capable of being influenced by the facts that may be brought to light by the study proposed.

These assumptions are, indeed, the axioms of our science, and it is because we accept them unreservedly that we are assembled here on this occasion. But, if I rightly apprehend the aims and purposes of this Congress, we are not here primarily as propagandists but as men of science, and as such we may not accept even the axioms of our high calling without examination of their scope and the method and limits of their application to the problems which we have set ourselves to solve.

What I have proposed to myself as the object of this paper is an analytical study of the conditions affecting the progressive reform of our criminal law and procedure, with special reference to the agencies through which such reform must be effected and the motives which affect those agencies. The obvious recourse in such an inquiry is history, especially the history of the criminal law and its administration. But, while the study of our Anglo-American legal history throws a flood of light on the relations between public opinion and criminal law, it has, I venture to think, a disappointment in store for those who look to it for a confirmation of the implications of the thesis at the head of this paper.

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There is, in fact, little to support the view that our criminal law and procedure have been largely determined by experiments with punitive measures. We have a record of a thousand years in which the tide of brutality ebbs and flows, but there is no sign of any reaction of the known conditions of prison punishment on the agencies making for the amendment of the criminal law, either on grounds of humanity or of expediency, up to the beginning of the last century. It was only when the artificial and hideous system of English penal justice broke down of its own weight, when judges and juries combined to render the death penalty an empty threat, that conditions began to improve; but the removal of the death penalty from a multitude of offenses meant more and more convictions and a consequent enormous increase in the number of those condemned to penal servitude and imprisonment; and though the exposure by Howard and others of the shocking enormities of the prison system in England and on the Continent resulted in important reforms in the management of penal institutions and of the conditions of prison life, it would, I venture to say, be hard to trace any effect of these or of subsequent disclosures in the general criminal law or its ordinary administration. The hard truth is that the attitude toward the criminal of the English and, to a considerable though a less degree, of the American public has been such as to render them impervious to the sentiments which the horrors of prison punishment would naturally excite. It was not until the humanitarian sentiment which has attended the growth of our western civilization had risen to a flood that it began to percolate into that last bulwark of barbarism. In that long period of waiting for the dawn of the new day the attitude of the law toward the criminal, which can only be described as one of ferocity, fairly reflected the sentiments of horror and hatred with which he was regarded by the law-making elements of the community.

Here we may profitably turn to a few moments' consideration of the agencies by which the character of the criminal law is determined. We are in the habit of speaking of law, especially under a popular form of government, as the expression of public opinion, but a study of our criminal jurisprudence shows that public opinion in the sense in which that phrase is commonly employed, as a general sentiment pervading the community, has upon the whole had little to do with either the content or the administration of that system. Professor Dicey has recently re-

minded us<sup>2</sup> that the opinion which directs the development of the law may not be the opinion of the community at large but that of a ruling class or of interests powerful enough under existing political conditions to make their influence controlling. Thus, while it cannot be denied that important and salutary changes in the criminal law have from time to time been made in deference to public opinion, and that in such countries as England and the United States public opinion in the widest sense of that expression has the potentiality to effect any changes that it may desire in the law of the land, it is submitted that the criminal law of those countries, as it now exists, is in the main representative not of the will of the community as a whole, but rather of class sentiment, and particularly of the sentiment of those—criminal judges and prosecuting attorneys—to whom the administration of the criminal law is committed. This is particularly true of England, where the committing magistrates as well as the higher officers of the law are chosen from the gentry. An ingenious English writer of the middle of the last century gave pointed expression to this fact by asking, "Who can doubt that, if the poor and not the rich had the making of the laws, the rule of crime and punishment would be vastly different from what it is at present? Trifling offenses against property would never then have been made the highest crimes, for it would not have been the interest of the law-givers to punish them most heavily. Was it on the principle of estimating a crime by its guilt or by its injury to society that sheep-stealing was punished with death while adultery was not a crime at all? . . . Surely, because it was for the interest of the higher orders that the laws were made."<sup>3</sup>

Speaking generally, it may be said that the attitude of the public has been negative, one of callous indifference to the fate of the wrong-doer, while the professional opinion, by which that fate was mostly determined, has been but too firmly convinced of the wisdom and justice of the Draconian code which it administered.

That I have not exaggerated in describing this professional sentiment as one of horror and hatred is easily demonstrated by turning to the pages of the late Mr. Justice Stephen's "History of the Criminal Law of England,"<sup>4</sup> where the right and the duty

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<sup>2</sup>A. V. Dicey, "The Relation Between Law and Public Opinion in England," 1905, p. 9.

<sup>3</sup>C. Estlin Prichard, "On the Principles and Objects of Human Punishments," an essay read in the theater, Oxford, June 20, 1844 (p. 44).

<sup>4</sup>Vol. I, 478; Vol. II, 75-93.

of entertaining sentiments of hatred and revenge against the criminal are eloquently asserted; and that these sentiments have actually entered into and determined the course of the law is declared by the same eminent authority: "The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it."<sup>5</sup> While it would probably not be fair to take the views of Mr. Justice Stephen as a correct expression of the sentiment of his class at the present time, it would not be difficult, I think, to show that his opinion is still largely entertained by criminal judges, and perhaps by the legal profession generally,<sup>6</sup> but his condemnation of the "misplaced and exaggerated tenderness which has come to prevail on the subject in the community at large"<sup>7</sup> is a convincing demonstration of the fact that the indifference and callousness of the public are at an end.

These facts would seem to point to public opinion rather than to the more obdurate professional opinion as the agency of amelioration; but this, I believe, is a mistake. The slowness with which public opinion is formed, its sluggishness and discontinuity will probably continue to give the interested and professional classes a controlling influence on the course of the criminal law and its administration, and it would seem to be the part of wisdom for those interested in criminal law and prison reform to address themselves primarily to the task of educating and forming the professional and expert opinion upon whose attitude so much depends.<sup>8</sup>

But before we undertake this task or the much more serious one of informing and rousing public opinion, it is incumbent upon us to pause and inquire what the best method of approach may be, and it is here that our real difficulties begin. For the opinion, public or professional, which sustains our present penal system is based on certain set beliefs or convictions as to the true and

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<sup>5</sup>Vol. II, 81.

<sup>6</sup>A striking instance was the declaration of a well-known prosecuting officer, made about a year ago in New York, in the presence of a group of gentlemen interested in criminal reform, that "a criminal is a wild beast and should be treated as such."

<sup>7</sup>Stephen, Vol. II, p. 93.

<sup>8</sup>Much may be hoped in this respect from the new American Institute of Criminal Law and Criminology, which has many judges and lawyers among its members, and from scientific gatherings such as this, where eminent jurists, criminologists and prison reformers meet and discuss with calmness and high intelligence the problems in which they are all alike interested.

proper end of punishment for crime, and these beliefs are many and widely divergent.

The policy of penal imprisonment, for example, may be supported on one or more of the following grounds:

(a) As a satisfaction of the sentiments of hatred and revenge which crime is calculated to excite, primarily in the victim and his family and friends, and then in lessening degree among others;

(b) As a means of redress or reparation of the wrong done, that the disturbed balance of justice between the offender and his victim may be restored;

(c) As a vindication of the outraged peace and dignity of the state, and (c<sup>1</sup>) as an expression of its reprobation of the offense committed;

(d) As an example to evil doers, and thus a restraining influence on others tempted to commit crime;

(e) As a salutary lesson to the offender, to bring home to him the truth that the way of the transgressor is hard;

(f) As a forcible means of restraining the offender, thus preventing him, during the period of his confinement, from further indulgence of his criminal propensities;

(g) As a means of moral amendment—that the soul may be purged through suffering;

(h) As creating a break in the habits and associations which have led to crime;

(i) As a necessary social provision for bringing new and more wholesome influences to bear on the wrong-doer in the hope of converting him into a useful member of the community.

It is to this diversity of ends, this complexity of motives affecting the question of prison punishments that most of the difficulties which attend all efforts for the reform of existing conditions are due.

There is a grim though unconscious humor in the criticism leveled by Recorder Cox at the Prison Congress which met at London in 1874. "If the Congress had commenced its useful labors by determining what should be deemed the proper purpose of punishment," he says, "three-fourths of its work would have been saved and its results would have been more fruitful of good." To this we can all say, Amen! assuming that there is only one purpose or only one "proper purpose" of punishment. But when there

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<sup>1</sup>E. W. Cox, "The Principles of Punishment," 2.

are many purposes, all of them valid and all entering into the actual determination of the provisions of the penal code, the unanimity demanded of the Congress is hardly to be looked for. And then, too, however united in sentiment and conviction, even Prison Congresses have to deal with things as they are and with practical means for making them what they ought to be. Can we by our votes make that not to be which is? The bare fact that confronts us is this: that the diversity of opinions which *may be held* as to the end or purpose of punishment *is actually held* by those members of the community, whether few or many, whose will finds expression in the criminal law, and that, while some of these purposes may be combined in the punishment prescribed for a given offense, others are inconsistent and can only be effected at the expense of one or more of the rest. Further, whether the ends proposed are mutually exclusive or susceptible of combination, the *principle* of punishment, by which the penalties of the law are measured and apportioned, will vary according to the importance which may by the law-making or law-administering authority be assigned to one purpose in comparison with others. Thus if the chief end in view be the vindication of the justice of the state or the satisfaction of the outraged feelings of the community, the punishment to be applied can hardly fail to depend to a considerable degree on the moral guilt of the wrong-doer; while, if the aim be repression by example, acts which men are most liable to commit, where temptation is greatest and the moral guilt therefore presumably least, may invite the severest penalties.

The application of these principles is further complicated by the growing recognition of the fact that there is no single formula which covers all persons convicted of infractions of the criminal code. Whether we believe or do not believe in the existence of a "criminal type," whether we accept or reject the theory that the criminal, like the poet, "is born, not made," we can hardly shut our eyes to the fact that the accidental or casual criminal differs in important respects—in social undesirableness as well as in his mental and moral outfit—from the habitual or instinctive criminal, and that these may differ as widely from each other; nor can we reject the inference that motives for punishment of the one class may have little or no application to individuals belonging to another class.

It is no part of the purpose of this paper to attempt a complete valuation of the several ends to which prison punishment

may be directed; all of the motives enumerated above are practically if not philosophically valid, and we can all agree that most if not all of them should be aimed at in a properly devised penal system. My object is the more modest one of indicating briefly what the study of conditions past and present may be expected to teach us with respect to the actual influence of these several motives and how that study may be most advantageously directed.

*First*, as to the vindictive or retaliatory purpose of punishment, it is obvious that this does still, to a considerable degree, color our criminal jurisprudence, and that the principles upon which it is founded do in fact enter to a considerable extent into the sentiments of those elements in the community by which our criminal law is actually shaped and administered. Mr. Justice Stephen's assertion of the right and duty of entertaining and giving effect to these sentiments has already been referred to, as has also the dramatic expression of the same attitude by a member of the American bar still prominently identified with the prosecution of criminals in one of our large cities.<sup>10</sup> The language of horror and indignation habitually employed by judges in sentencing criminals convicted of atrocious crimes, the very fact of the survival of the term "atrocious" in connection with certain crimes, furnish abundant evidence of the persistence of this sentiment in the law.

Is there a place for this principle of retaliation in a sound system of penal law? Plato answers this question emphatically in the negative. "No one punishes the evil-doer under the notion or for the reason that he has done wrong; only the unreasonable fury of a beast acts in that manner. . . . Who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone."<sup>11</sup> But Plato, unaware of the derivation of our human nature from the beast, imputes even to the Athenians of his day a philosophic attitude toward the criminal which belongs rather to the ideal republic governed by the principles of pure reason than to the actual Athens of his time. That in a rational system there is no room for the rage of the beast, that it comports neither with the dignity nor the moral integrity of the state to act as the agent of the individual in executing vengeance on the wrong-doer, will of course be admitted without argument. But "it is a condition, not a theory, that confronts us," and the ques-

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<sup>10</sup>Page 721, *supra*.

<sup>11</sup>Protagoras, 324. (Jowett's translation.)



tion still remains whether, in human society as we find it in these opening years of the twentieth century, some concession must not yet be made to "the ape and tiger" which survive in our common heritage of humanity. It is doubtless true that in the most orderly communities, where the reign of law is fully established, and in the case of most offenses, the principle of revenge is a diminishing element in the criminal law and that it tends constantly to disappear. But our criminal law must represent the prejudices as well as the humanity of the community, its fury as well as its pity, and a law which from this point of view errs on the side of mildness may be as ineffective as one which errs on the side of harshness. In the latter case courts and juries will refuse to convict; in the former the ordinary procedure of the courts will be superseded by mob violence. The prevalence of "lynch law" in certain backward communities would seem to point to the existence of a social demand in those communities for more rigorous dealing with crimes of certain sorts than the ordinary criminal law provides. As practical men, therefore, dealing, as we must, with actual conditions, we may, however reluctantly, be compelled deliberately to frame and administer our criminal law so as to admit the principle of revenge to a limited extent, for such time as may be required to bring the community to a better mind. What is here needed is education and the development of a sentiment of respect for the law through the prompt and orderly administration of justice through its established instrumentalities.

*Second.* This, which may be called the compensatory or retributive purpose of punishment, presents a double aspect, according as it is viewed from the standpoint of the individual directly affected by the criminal act or of the community whose standards of justice are infringed by it. Primarily it aims at restitution or reparation made, wherever that is possible, to the injured party; derivatively it seeks to satisfy the sense of justice of the community. Eliminating entirely the element of passion or revenge, there can be no doubt that to most men and women justice continues to present itself as a balancing of the scales of merit and demerit—on the one side the wrong, on the other the compensating penalty. Applied with naive literalness in the primitive codes of the race ("an eye for an eye and a tooth for a tooth"), supported by philosophy<sup>12</sup> as well as by popular opinion,<sup>13</sup> it is still a potent

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<sup>12</sup>Aristotle, *Ethics* VII: Kant, *Rechtslehre*, II, i. e., F. N. Bradley, *Ethical Studies*, 25. However, the weight of modern philosophic opinion is against this view.

force in our criminal jurisprudence.<sup>14</sup> The provision of the English law which couples penal servitude with the indeterminate sentence is avowedly based on this principle,<sup>15</sup> and the sentiment to which it gives expression is doubtless the chief obstacle to the general acceptance of the reformatory principle of punishment.

Linked, as it is, on the one side to the moral law, on the other to the laws of nature, rooted in the noblest and most permanent sentiment of our humanity, the passion for justice, there is a satisfying quality in this ideal conception of the justice of the state which must appeal to all.

If justice were an end in itself, or if our human justice were an emanation of that law "whose seat is the bosom of God, whose voice is the harmony of the world," we should, indeed, be compelled to recognize the validity, nay, the sufficiency, of the principle of expiation. But if, as we hold, justice is but a means to a further end, the progressive amelioration of life in society, then we may well question the validity of the principle of retributive punishment; and if we find that, however complete in itself, it tends to defeat that ultimate aim of human betterment, we shall be compelled to reject it as a purpose to be aimed at in a sound penal system. The principle of atonement has its place in the natural as well as in the spiritual order; but, in the one as in the other, the mechanical interpretation to which it too easily lends itself makes it a dangerous one to invoke. This has been clearly demonstrated in the experience of society in the field of criminal law. It has placed the community in the attitude of saying to the offender, "Now that you have paid the penalty of your crime, you may go and sin again;" and it has too often led the criminal to feel that, having paid the penalty of his crime, his account with society is squared.

But it is necessary again to remember that we are not engaged in framing an ideal code. A principle which demonstrably

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<sup>14</sup>As expressed in the maxim, "Let the punishment fit the crime."

<sup>15</sup>"It may be affirmed that the most natural idea of the magistrate and the most usual \* \* \* is that punishment is exacted, not merely in order that crimes may not be committed, but because an evil deed has been done."—C. Estlin Prichard, *ubi supra*, 28.

"The law affords a very clear proof that its real purpose is to administer retributive justice and that punishment has no end beyond itself," etc.—J. A. Farrer, "Crimes and Punishments," 1890, p. 80.

<sup>16</sup>See paper of Sir E. Ruggles-Brise on "Professional Criminals," contributed to the International Prison Congress, held at Brussels in 1900.

lacks rational justification may still have a present validity, and it is submitted that we are not at liberty in a consideration of the purposes of punishment for the world of to-day to ignore a sentiment so deep-seated and keenly felt as that of retribution for wrong done. But this is not to admit its eternal validity nor even its present advantage either to society or to the individual who comes under that iron law, but, at the most, its temporary necessity.

*Third.* The vindictory or ethical purpose of punishment, as I venture to designate it, stands on higher ground than either of those heretofore considered, inasmuch as its aim, though also punitive, is fundamentally corrective. The conception of the state as essentially moral and of its function as that of a potent agency for encouraging and sustaining the higher life furnish a philosophical basis for penal legislation inspired by that aim, while we must recognize, even if we can but dimly discern, the salutary effects of the principle in action. It must, I think, be admitted, that society should, in some commanding and even dramatic form, give expression to the principles upon which it is based, that the weak will may be made strong and the current morality heightened by such affirmation, that "the everlasting yea" and "the everlasting nay" have not lost their power over the hearts of men. We might, indeed, give unhesitating assent to the application of a principle so elevated and salutary were it not for the fact that its administration is so apt to be complicated by considerations, still more by feelings, drawn from the principles of punishment already examined by us and condemned.

I conceive that this danger may be largely obviated by persistence in certain lines of investigation into which the new sciences of psychology, anthropology and sociology invite us and by a study of the social and personal history of the individual wrong-doer, including his heredity and pathology, physical and mental. A demonstration of the fact, which we may well consider indubitable, that criminal conduct is usually, if not always, the result of conditions more or less beyond the control of the delinquent, cannot fail to shake the theory of moral responsibility on which the vindictive and retributive principles of punishment are based, as well as to allay and in time overcome the feeling of resentment which such conduct now excites. Emphasizing the *moral capacity* rather than the *moral responsibility* of the citizen, the ethical principle of punishment has nothing to lose but much

to gain from an investigation which will set forth in clearer relief his capacity for responding to the insistence of society on a well-ordered life. In this connection much may be hoped from the study of social history and from the realizing sense which such study will bring home to us of the extent to which the current morality depends upon the institutions and social relations which are the best fruits of our civilization and which constitute the chief safeguards of the social virtues. We shall thus come to understand that the "normal man" is not only the man of normal impulses, but the man of normal impulses placed in a normal environment. The strongest of us need the safeguards provided by society for the conduct of life. Our weaker brethren need not worse but better conditions, not weaker but stronger incentives to right living than those by whose aid we tread the narrow path.

*Fourth.* The exemplary or deterrent theory of punishment has a long history. Maintained by Plato<sup>16</sup> and other philosophers of the ancient and modern world,<sup>17</sup> it has become the orthodox view of the purpose of punishment<sup>18</sup> and the most important factor in the shaping of our criminal law and its administration.<sup>19</sup> It reached its completest expression in the hideous cruelties of the English penal law of a century ago with its grotesque multiplication of capital offenses, and there is no reason to believe that the collapse of that system, to which reference has already been made, was influenced to any considerable extent by doubts as to the validity of the principle which it exemplified. There is something touching in the unquestioning faith of the legal profession on the one hand, and of the man in the street on the other, in the efficacy of this vicarious suffering for crimes not yet committed. Yet it remains a matter of faith almost wholly unsupported by evidence. The proof furnished by experience is thus far wholly negative—that the deterrent effect of punishment, if any there be, does not depend on the degree or kind of penalty inflicted; or rather that excessive punishments defeat the end in view by inducing a reck-

<sup>16</sup>Protagoras, 324; Laws, IX, 862; XI, 934.

<sup>17</sup>Seneca, *De Ira*, I, 16; Hobbes, *Leviathan* II, c. 28;

T. H. Green, "Principles of Political Obligation," II, 178, 187-206.

<sup>18</sup>Sir Edmund F. DuCane, "The Punishment and Prevention of Crime;" Edward A. Cox, "The Principles of Punishment." See also the address of Sir E. Ruggles-Brise, delivered before the American Prison Association, in Washington, D. C., October 2, 1910, *The Survey*, XXV, 179.

<sup>19</sup>Illustrated in the familiar story of the English judge passing sentence on a horse thief: "You are sentenced to be hanged, not because you stole a horse, but in order to prevent others from stealing horses." The principle finds frequent expression in judicial language.

less disregard of consequences as well as by stimulating a hatred for the law because of its injustice and oppressiveness.<sup>20</sup>

On the other hand, it cannot be doubted that there is a substantial foundation in human experience for this deep-seated conviction as to the deterrent effect of terror inspired by the threat of punishment for wrong-doing. But that this result may be attained the threat must be made good, the penalty prescribed by law must actually and in the majority of cases follow speedily on its infraction. That the certainty, or even the probability, of swift detection and punishment would in very many instances deter from wrong-doing is a fact that needs no demonstration: but can any deterrent effect be attributed to a system of criminal administration like that of the United States, which can only be described as casual in its operation, where the offender faces a rare prospect of punishment following a still rarer discovery and conviction?<sup>21</sup> In a community whose criminal administration can thus be described it can truthfully be said that the law has no terror for evil-doers and fails completely to realize its deterrent purpose.

The obvious remedy for this condition of affairs is the progressive improvement of the entire system of criminal administration from the police and detective system at the one extreme to the exercise of the pardoning power at the other.

But when this has been accomplished there will still remain the problem—never, perhaps, to be completely solved—of the apportionment of penalties to secure the maximum deterrent effect with respect to crimes of different sorts and upon criminals of different types. As an aid in its solution, well-considered experiments in repressive legislation aimed at crimes of frequent occurrence, or, on occasion, increased severity on the part of criminal magistrates, as in the substitution of imprisonment for fines, together with careful observation of the effects of such action, might be expected

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<sup>20</sup>See Montesquieu, *The Spirit of Laws*, VI, c. 12; Beccaria, c. XV, XVI: "This useless prodigality of punishments, by which men have never been made any better." There is a declaration to the same effect in the Constitution of the State of New Hampshire, Part I, Art. 18.

<sup>21</sup>Even in England, where the administration of the criminal law is much more efficient than in the United States, it would appear that less than 25 per cent of crimes reported to the police are followed by conviction. Farrer, 93; Hill, *Crime*, 28. In this country the percentage of convictions must be further corrected for the numerous instances in which conviction is not followed by punishment.

to yield results of some value,<sup>22</sup> while the continued study of criminal psychology and criminal anthropology can hardly fail to demonstrate the fact that upon a large element of the criminal population the penalties of the law have no deterrent influence whatever.

*Fifth.* As to the deterrent effect of punishment on the offender (a secondary object of penal legislation, according to DuCane, Cox and other modern authorities), we already have data of considerable value in the statistics of recidivism. The fact that a very large proportion—in some countries more than 50 per cent—of the criminals under confinement have previously undergone prison punishment seems to indicate that as a lesson to the offender punishment by imprisonment leaves something to be desired. But it is only fair to observe that the facts at present available are wholly insufficient to serve as a foundation for a definite conclusion. The study of recidivism must be further pursued with special reference, on the one hand, to the kind of offenses which are repeatedly committed and, on the other hand, to the nature of the imprisonment previously undergone—whether separate or communal, whether in idleness or at hard labor, whether under humane and reformatory conditions or under those that have heretofore characterized our penal institutions. Such study should lead to trustworthy inferences as to the extent to which prison conditions have been responsible for the vicious habits and tendencies which converted the first offender into an habitual criminal and thus in some measure modify the unfavorable conclusions which the statistics suggest as to the deterrent effect of punishment *per se* upon the individual subjected thereto.

*Sixth.* The principle of preventing further violations of the law by the confinement of the lawbreaker has played a considerable role in our criminal jurisprudence and has furnished a justification for sentences of long imprisonment, especially in the case of hardened or desperate criminals. Of course this remedy is efficacious while it lasts, the principal objection to its application hitherto being that, not being based on any adequate study of the offender and of the conditions determining his criminal career, it has been indiscriminate and without method. If restricted, as it should be, to those in whom a criminal habit or tendency has been established, it will certainly be more sparingly employed than has frequently been the case in the past. The further fact that, not

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<sup>22</sup>See the instance cited by Recorder E. W. Cox out of his own experience as a magistrate, "The Principles of Punishment," 36.

being attended by corrective or reformatory influences but rather the reverse, the application of this principle has too often had the effect of confirming criminal tendencies or of creating them where they did not exist before, has made of it a social menace instead of the protective device which it aimed to be. This reproach has now to a large extent been removed by the rise and development of the reformatory treatment of criminals, and this has rendered possible the extreme application of the principle of preventive restraint—the indeterminate sentence. Under these conditions the prison and subsequent history of the criminal opens up a new and inviting field of study which may be expected to yield rich results.

*Seventh.* The principle that punishment for crime may, quite apart from the fear inspired and without the addition of reformatory influences, be a means of moral amendment, finds expression in many judicial utterances. It is obviously a well-meant but mistaken attempt to bring the sanctions of the moral law and of the ecclesiastical dispensation to the aid of the criminal law. As the soul is purged by suffering, as the contrite heart is purified by penance, so may the criminal find means of grace in the pains and penalties imposed by the law he has violated. Of course this doctrine imputes to the law a sanctity which the criminal who finds himself in its toils would be the last to concede to it; and so, quite apart from the vile and degrading conditions under which this work of grace was to be effected, it is not to be wondered at that we find no traces of its efficacy. It is, perhaps, within the bounds of possibility that under a penal system in which self-respect and manhood are restored there may come to some of those who undergo that discipline a sentiment of gratitude which will transmute the punishment into a means of moral regeneration.

*Eighth.* The theory that confinement in prison for a longer or shorter time is an efficient means of weaning the criminal from the habits and associations which have brought him to a life of crime has had little to commend it during that long period—unhappily not yet past—when the prisons supplied associations and inculcated habits as vile and demoralizing as any that existed outside its walls. Under the new dispensation, which we are here to hasten, the theory acquires a new meaning which makes it susceptible of wide application. Even where the influences of prison life are purely negative and the prisoner is merely protected against moral contamination (if such condition can exist), the principle is a valid one. Where, in addition, reformatory influ-

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ences are brought to bear we find ourselves under the benign conditions which will next be described. A study of the domestic and social environment of the individual criminal, especially in the case of a first offender, will throw light upon the question of the length of confinement necessary in a given case to permit the dispersion of the group of bad companions who may be responsible for his downfall or to permit charitable or other social agencies to create more favorable conditions to receive him on his release.

*Ninth.* The principle of the reformation of criminals through the experiences of a prison life adapted to that end is too well known to my audience to require explanation.<sup>23</sup> It claims to attain all the proposed objects of prison punishment, in so far as these are attainable and desirable, and to provide conditions which make some of them feasible and salutary when without its aid they would fail of their object or prove pernicious in operation. It does not assume that all criminals are susceptible of reformation, or even of improvement, nor that those who are can all be brought up to the same level of good citizenship. It does assume, however, that most men and women and all children will respond to the steady pressure of a wholesome, uplifting environment, and that the vast majority of those who come under its influence are capable of becoming useful members of society; and it has already, in the brief term of the experiment, proven its faith by its works. It has opened up a vast field of investigation and study—the field of human nature, in its normal and abnormal manifestations. It must have cognizance of the life-history of every individual committed to prison, with his heredity and environment. It studies him in prison—his needs, his capacities, his aspirations, his mental and moral equipment, his health and his reaction to the various experiences of prison life; it follows him after his discharge and studies further the effect upon character and circumstances of his experience of life as a free man. It levies on all the sciences that deal with man—law, medicine, criminology, sociology—and seeks through these to interpret and generalize the extensive data so gathered.

We are now prepared to answer in general terms the question of the influence of the study of prison punishment upon the criminal law of England and the United States. As has been said above, no change in the law of any importance can be traced to the study or to the general knowledge of prison conditions prior

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<sup>23</sup>Reformation and not vindictive justice is in several state constitutions declared to be the purpose of the penal code. See constitutions of New Hampshire, Indiana, Oregon, North Carolina and South Carolina.



to the last century. It was due to such study, however, that prison conditions in themselves underwent important changes, beginning in the last quarter of the eighteenth century and continuing without interruption down to our own time. It was the breakdown of the Australian convict system that marked the first feeble beginnings of legal (as distinguished from prison) reform in England about the middle of the last century, and the same feeble and tentative gropings toward better things appeared in this country in the barren period from 1825 to 1869, when the act establishing the Elmira Reformatory was passed by the New York legislature. It is from this latter date that we must reckon the period of criminal law reform, based on a consideration of the effects of prison punishment on the criminal and on the community at large. It was the shocking conditions of prison life and the moral contamination in which they resulted that have given to the world the Elmira system, the indeterminate sentence and the probation system. It is to the same degrading conditions that our children owe the elaborate provision of reform schools, detention homes, Juvenile courts and, finally and best of all, a new body of law for the juvenile delinquent based on the theory that he is the child of the state, to be saved, instead of a little demon, to be damned.

And of the elaborate array of motives for punishment which I have placed before you, it appears that those only which connect themselves with the reformatory movement of the last forty years have any important or considerable field for investigation, any ascertainable and commanding facts to bring to light and, consequently, any future. The next few years will give us new data of great importance relating to the conditions under which our criminals are bred, to the obduracy of the incorrigible, to the capacity of fallen manhood and womanhood under proper conditions to renew themselves, to the methods by which children may be saved from lives of crime and shame. But there will be no facts for him who regards the criminal law as an instrument for venting hate and wrath on a fallen—and convicted—brother, none for him who would keep his fellow man in subjection to his iron law by terror, none for him who would work redemption through another's suffering. All these, coming with empty hands, shall abide as they are until the judgment. But the bringers of good tidings shall enter in and be prospered.

Let no one doubt that the new spirit which has found its way

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into the law will soon penetrate into every fiber of its structure. The new moral atmosphere which has made every man his brother's keeper will be felt in the law courts as well as in the home and street. The new attitude of the state toward the child of tender years will soon mark her attitude toward her erring children of larger growth. There will be no more criminals to be hated and punished, but weak and fallen brothers and sisters to be cherished and saved—saved that they may live, that the state may live. It has been a long journey from the era of hatred and contempt, but the end of the reign of terror is in sight.